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A COURT OF DOMESTIC RELATIONS AND A UNIFIED COURT SYSTEM.

Attorneys in Minneapolis are engaged in a controversy over the establishment of a Domestic Relations Court having jurisdiction to appoint lay investigators to investigate the causes for divorce and make recommendations to the Court under certain conditions. The proposal is defended by Judge Horace D. Dickenson and Judge Edward F. Waite. It is being opposed by a large group of the members of the Hennepin County Bar Association who have appointed a committee headed by Mr. A. T. Conley to oppose the establishment of the new court. We quote from a press clipping recently sent us:

"Mr. Conley, in a prepared address, argued that the number of divorces now on the Hennepin county court dockets would not be there if the judges had heard divorce cases during the summer instead of letting them accumulate. He denied that any large number of the cases presented by attorneys were fraudulent, and contended that the fact that a domestic relations court was successful in some other cities did not mean it would succeed in Minneapolis.

"It is not right," said Mr. Conley, "that everyone seeking divorce be branded as a criminal to be investigated by an officer, as is proposed for this court. Those persons, scrupulously conscious that the only legitimate and proper way of separation is through divorce, who institute such proceedings, are sufficiently humiliated, and ought to be entitled to divorce, if the grounds are proven according to law."

We cannot intelligently discuss the particular proposal which is now agitating these lawyers of Minneapolis, but we are frank to say that we do not fully understand the fears of Mr. Conley and those he represents. He seems to fear the preliminary investigation feature of the new proposal. That feature may be an unnecessary expense, but that it would humiliate plaintiffs or impede any honest plaintiff in securing a divorce we do not believe. Most plaintiffs desire to tell their story to anyone who is in a position to give them relief.

The feature about this proposal or any similar proposal that we would object to is the fact that it adds another detached judicial body to the governmental organization to make confusion in the administration of the law worse confounded. We suggest to all those interested in having the administration of justice segregated and specialized that they work along the lines of the unified court plan proposed by the American Judicature Society, whose offices are at 31 West Lake street, Chicago, and whose secretary, Mr. Herbert Harley, we are quite sure, would be glad to furnish anyone interested with very valuable information.

When there is established in any state one Supreme Court of Judicature which is supervised and controlled by a Chief Justice at the state capital and which controls the administration of justice throughout the state from the highest court of appeal down through every immediate court to the most insignificant police justice in a remote rural community, who thereby becomes a member of the same court with the chief justice, such a court will be able without legislative assistance to establish as many different branches as may be desirable and select certain judges to try certain causes and set aside as many courts and judges as may be needed to handle special subjects of action, as Equity, Juvenile Delinquency, Domestic Relations, Crimes, Civil Jury Trial, Non-Jury Cases at Law, Decedent's Estates, Small Claims, Misdemeanors, etc. When, however, additional courts are established by the legislature, each unrelated and independent of the other, the jurisdiction is bound, in many respects, to overlap the jurisdiction of some other court and confusion results. Plaintiffs are compelled, if a mistake is made, to get out of one court and get into another at needless expense. So also the conditions which caused the court in the first instance to be established

may change so that the court has nothing to do and the Judge cannot be transferred to other duties.

We believe lawyers should consistently oppose the creation of new judicial tribunals until some unification of judicial administration is brought about which will put our judges under a supervising officer as all executive officials are put under the supervision of the governor.

Some of our large cities, like Chicago, New York, Cleveland and others, have made the attempt to unify their local jurisdiction by the establishment of municipal courts which, as in the case at Chicago, have attracted to themselves much of the business of the Superior Courts and Justice Courts until, in some cases, they do many times the business of all the other state courts. The Municipal Court of Chicago, it is interesting to note, is always seeking new means of adjusting the court machinery and its 27 judges to meet the changing conditions of a big city. This Court recently established an Arbitration Division which, we understand, has become popular with business men who desire a speedy determination of the facts of a controversy. This experiment of a unified court has proven so uniformly successful that it leaves no room for further debate on the relative benefits of one court controlled by a Supreme Justice and so flexible in its operations that it can accommodate itself to every new judicial emergency, and of many courts each an independent unit in itself and controlled by or responsible to no higher authority for the character of its administration nor competent to receive assistance from any other judge or court.

Under the unified court plan, whenever the legislature desires to create a new judicial tribunal it merely enlarges the jurisdiction of its Supreme Court of Judicature and provides for more judges if necessary. The responsibility, however, for the successful administration of the new jurisdiction is put upon the whole court acting through its administrative head. In such cases there will not only be progress but there will also be harmony and efficiency.

NOTES OF IMPORTANT DECISIONS.

SELLING PROPRIETARY MEDICINES UNDER NEW DIFFICULTIES.—It may be still a fact today, as in Barnum's time, that there is one born every minute, but, if so, the federal government is making it increasingly difficult to take advantage of the situation. Two recent cases, for instance, show the difficulties in the way of those who seek fortunes by selling concoctions of uncertain efficacy, but for which they claim great virtues for healing the ills of humanity. Hall v. United States, 267 Fed. 795; Leach v. Carlisle, 267 Fed. 61.

In the Hall case the action was a libel by the United States against 141 bottles of Hall's Great Discovery. The proceeding was under the Pure Food and Drug Act (par. 3, Sec. 8) dealing with the offense of "misbranding." The "misbranding" in this case was alleged to be in a label on the bottle declaring that the medicine was good "for Kidney and Bladder Troubles, Diabetes, Weak and Lame Backs, Rheumatism and Gravel." The Court in the Hall case in affirming a decision for the government said:

"Language used in the label is to be given the meaning ordinarily conveyed by it to those to whom it was addressed. When so read and construed, it amounted to an assertion that the article referred to, if used as directed, might be expected to have a curative or alleviating effect on the classes of ailments mentioned. There was no indication of an intention to except any ailment embraced in those classes. Evidence adduced showed what were the ingredients of the article called 'A Texas Wonder,' and that those ingredients could not, singly or in combination, have any remedial or beneficial effect on any ailment of the kinds mentioned in the label."

In the Leach case the action was by a patent medicine vendor to enjoin the postmaster at Chicago from enforcing a fraud order against plaintiff doing business under the name "Organo Products Company." The postmaster acting under authority of Rev. St. §§ 3929, 4041, and after a full inquiry, declared that the business of plaintiff in selling "Organo tablets" through the mail with the claim that they would cure sexual weakness and restore lost manhood was a scheme to defraud by use of the mails.

The Court of Appeals affirmed a decree for the defendant and dismissed plaintiff's bill for injunction solely, however, on the ground that the advertising made extravagant and unfounded claims and not that the ingredients of which the tablets were compounded had no therapeutic value. It is interesting to note that the Court holds that under the "fraud order" law the postmaster has no right to determine the therapeutic value of a patent medicine for the purposes indicated. The Court said:

"Search for some clime or condition or spring or substance which would arrest human decay, and restore manly strength and vigor, is coeval with love of life and strength, and dread of decay and death. Whether wholly or partly predicated on superstition, or fact, or both, the thought is as old as the hills that to partake by way of food or otherwise of certain parts of animals will produce beneficial effect in the corresponding part in man—the brain, the heart, the stomach, and notably the testicles. There has long been more or less prevalent the practice of resorting to the testicles of animals as an article of food or medication for prolonging, restoring, or augmenting manly strength and sexual power. Among some it is believed that the lion, the tiger, the bull, and other animals of great strength are the most efficacious in this regard. The ram also has had favorable mention. In recent years scientific investigations have been conducted, with more or less beneficial result, respecting the employment of animal substances in the treatment of human ailments. Pepsin from stomachs is employed to treat some stomach troubles in persons, extracts from animal thyroid glands are used for human thyroid ailments, and other instances might be cited. Some decades since Dr. Brown-Sequard, a noted French neurologist, conducted a series of experiments on himself with hypodermic administration of animal testicular lymph, as to which he reported a very considerable degree of success; and his writings on the subject gave impetus to further experiments, and the use of such preparations in the treatment of sexual disorders and shortcomings.

"Considerable literature is extant upon the subject, and it appears that some physicians employ such remedies, and that many others decry their use. For some time back such substances have been made in considerable quantities, and the very testicular product in question is made and sold at least by one of the large packers, and by a number of the extensive manufacturers here and abroad, to supply any public demand for it. Under the record facts the most that could be said is that doctors and others, who might reasonably be supposed to possess expert knowledge upon the subject, disagree as to whether or not such substances have any remedial virtue.

"It was not the design of these statutes to vest the Postmaster General with authority to determine between contradictory views held in apparent good faith upon a subject the merits or demerits of which may fairly be said to be a matter of opinion among those who ought to know. American School of Magnetic Healing v. McAnnulty, 187 U. S. 94, 23 Sup. Ct. 33, 47 L. Ed. 90. It would follow that, if the order herein is sustainable only upon the inefficacy and absolute want of remedial virtue of the substance which appellant sells, the injunction should have issued."

The rule as to patent medicines seems to be that the United States government has not the right, either under the "fraud order" section of the Post Office Act or under the "Misbranding" section of the Pure Food and Drugs Act, to inquire into the therapeutic efficacy of ingredients used, provided the claims made for the concoction are not extravagant or calculated to deceive the public. If some person sincerely believes that a combination of roots and herbs will cure rheumatism he is at perfect liberty to announce such belief even in the face of universal medical opinion to the contrary and to state the actual results of his investigation, but if in trying to sell his medicine he makes statements which are not true or claims for his preparations merits which are so extravagant and enticing as to be calculated to deceive the public, he can be proceeded against under either of the laws herein mentioned.

EFFECT OF EFFORTS TO COMPROMISE OFFENSES UNDER THE INTERNAL REVENUE LAWS.—The great increase in the number and character of offenses under the internal revenue laws is bringing into prominence that section of federal statutes which permits the Commissioner of Internal Revenue, with the advice and consent of the Secretary of the Treasury to compromise any civil or criminal case arising under the internal revenue laws instead of commencing suit thereon; and, with the advice and consent of the said Secretary and the recommendation of the Attorney General, to compromise any such case after a suit thereon has been commenced.

In the recent case of Oliver v. United States, 267 Fed. 544, defendant in defense of a prosecution for a violation of the Harrison Narcotic Act offered in evidence a check for $100.00 to the Collector of the District where the trial was had, which he offered to show was given and accepted as a compromise of the criminal proceeding then pending. The trial Court excluded this evidence which the Court of Appeals (4th Cir.) held to be error and reversed the judgment of conviction.

The strange thing about this decision is that it does not appear that the Commissioner of Internal Revenue ever received the check sent to the local collector and it is admitted that the case was not compromised by him nor was

any promise of compromise made to him by said commissioner, which is necessary, it seems to us, to bring the case within the decisions in the cases of United States v. Chouteau, 102 U. S. 603; Rau v. United States, 260 Fed. 134. For this reason we are inclined to agree with Waddill, J., who dissented in the principal case when he said:

"It was never intended that this law, thus generously passed in the interest of an accused, should be resorted to for the purpose of having the executive authorities of the government do other than settle or refuse to settle cases, and to allow a defendant to open correspondence looking to a settlement, and without concluding the same, to interpose his action as a further defense to the prosecution, is entirely subversive of the spirit of the act in question, and would quickly result in endless confusion and conflicts between the courts and the executive branches of the government."

Such compromises, it seems to us, or agreements to compromise, should be specially pleaded and referred to the Court for decision. On the other hand, if such a compromise or agreement to compromise is proven, it should be given effect by the trial Court and the case taken from the jury. In this connection the following quotation from the opinion of the Supreme Court in the Chouteau case, supra, is pertinent. The Court said:

"The compromise pleaded must operate for the protection of the distiller against subsequent proceedings as fully as a former conviction or acquittal. He has been punished in the amount paid upon the settlement for the offense with which he was charged, and that should end the present action, according to the principle on which a former acquittal or conviction may be invoked to protect against a second punishment for the same offense. To hold otherwise would be to sacrifice a great principle to the mere form of procedure, and to render settlements with the government delusive and useless."

The defendant in the principal case neglected an important obligation resting upon him to follow up his offer to compromise by securing its acceptance. If every defendant by simply making an offering and tendering his check for an amount he is willing to pay can force the government either to return his check immediately or have its silence or neglect in that regard taken as an acceptance of the compromise, an unjust and unfair burden is put upon the government by a statute by which it was intended to confer only a privilege upon a defendant and not to arm him with more effective means of defense.

DOES THE VOLSTEAD OR PROHIBITION ENFORCEMENT ACT REPEAL STATE RESTRICTIVE PROHIBITION OR TAX LAWS?

The Eighteenth Amendment to the Federal Constitution provides in Section 2:

"The Congress and the several States shall have concurrent power to enforce this article by appropriate legislation."

The Volstead Act, Section 35, provides that:

"All provisions of law that are inconsistent with this Act are repealed only to the extent of such inconsistency, and the regulations herein provided for the manufacture or traffic in intoxicating liquor shall be construed as in addition to existing laws."

In the case of State of Rhode Island vs. Palmer,[1] the Court held that Section 2 giving Congress and the States concurrent power to enforce the Eighteenth Amendment by appropriate legislation does not authorize Congress or the States to defeat or thwart the prohibition contained in Section 1, but only to enforce it by appropriate means. By authority of Section 2 of the Eighteenth Amendment, the Sixty-sixth Congress enacted the National Prohibition Act, known as the Volstead Act. It was sustained by the Supreme Court.

Many Recent Decisions Sustain State Laws Enacted Before and After the Adoption of the Volstead Act.—Supreme Court Justice James J. Bergla, of New Jersey, in charging the September Grand Jury of Middlesex County, under date of September 21, 1920, declared that the Eighteenth Amendment and Volstead Act did not *abrogate* any State Law which prohibits the sale of liquor, that all such laws are still in force and *must* be enforced by the State authorities. The same position was taken by Supreme Court Justice Swayzellin charging the Essex County Grand Jury in Jersey City under the same date, also by Chief Justice Gunmere in charging the Essex County Grand Jury at Newark, N. J., the same date. Judge Tuthill, of the Supreme Court of

(1) 40 Sup. Ct. 486.

New York, recently decided that all State Laws prohibiting the liquor traffic were not repealed or modified by the National Prohibition Law.

In the case of United States vs. Barnhart,[2] a case growing out of the murder of one Indian on a reservation, the Court held a person living under two Governments may commit two crimes. By doing one act in such case, the conviction or acquittal of the crime in a forum of the State is not bar to a prosecution of the other in a forum of the United States.

Massachusetts Case on Concurrent Power.—In the case of Commonwealth vs. Florence Nickerson,[3] in the Supreme Court of Massachusetts, the question was: Is a State Statute, enacted prior to the going into effect of the Volstead Act, repealed by this latter Act?

The Court held: "The amendment does not require that the exercise of the power by Congress and by the States shall be coterminous, coextensive and coincident. The power is concurrent; that is, it may be given different manifestations directed to the accomplishment of the same general purposes, provided they are not in immediate and hostile collision one with the other. In instances of such collision, the State legislation must yield."

"We are of opinion that the word 'concurrent' in this connection means a power continuously existing for efficacious ends to be exerted in support of the main object of the amendment and making contribution to the same general aim according to the needs of the State, even though Congress also has exerted the power reposed in it by the amendment by enacting enforcing legislation operative throughout the extent of its territory. Legislation by the States need not be identical with that of Congress. It cannot authorize that which is forbidden by Congress. But the States need not denounce every act committed within their boundaries which is included within the inhibition of the Volstead Act, nor provide the same penalties therefor. It is conceivable also that a State may forbid under penalty acts not prohibited by the Act of Congress. The concurrent power of the States may differ in means adopted, provided it is directed to the enforcement of the amendment. Legislation by the several States appropriately designed to enforce the absolute prohibition declared by the Eighteenth Amendment is not void or inoperative simply because Congress, in performance of the duty cast upon it by the amendment, has defined and prohibited beverages and has established regulations and penalties concerning them. State statutes, rationally adapted to putting into execution the inexorable mandate against the sale of intoxicating liquors for beverage contained in Section 1 of the admendment by different definitions, regulations and penalties from those contained in the Volstead Act, and not in conflict with the terms of the Volstead Act, but in harmony therewith, are valid. Existing laws of that character are not suspended or superseded by the Act of Congress. The fact that Congress has enacted legislation governing in general the field of National Prohibition does not exclude the operation of appropriate State legislation directed to the enforcement by different means of prohibition within the territory of the State."

"The power thus reserved to the States must be put forth in aid of the enforcement, and not for the obstruction of the dominant purpose of the amendment. It must not be in direct conflict with the Act of Congress in the same field. Subject to these limitations, growing out of the nature of our dual system of Government, the power of the States is constant, vital, effective and susceptible of continuous exercise. We think that these results follow from the words of the amendment, from the implications of conclusions 8 and 9 of the opinion in Rhode Island vs. Palmer, and from the other decisions to which reference has been made."

Chapter 455, Laws of 1919, expresses a purpose to provide for the enforcement of the Act of Congress "commonly known as War Prohibition." This does not limit the operation of the statute to the matters prohibited by the Act of Congress, if, by its terms, it is broader than the Act of Congress. The State statute is a separate, complete and independent act.[4]

Federal and State Liquor Tax Laws Are Not Repealed.—Section 35 of the Federal Prohibition Code provides as follows:

(2) 22 Fed. 285.
(3) 128 N. E. 273.
(4) State v. Hosmer, Minn., 175 N. W. 683; State v. Brothers, Minn., 175 N. W. 685.

"This Act shall not relieve anyone from paying any taxes or other charges imposed upon the manufacturer or traffic of such liquor. No liquor revenue stamps or tax receipts for any illegal manufacture or sale shall be issued in advance, but upon evidence of such illegal manufacture or sale, a tax shall be assessed against, and collected from, the person responsible for such illegal manufacture or sale in double the amount now provided by law, with an additional penalty of $500.00 on retail dealers and $1,000 on manufacturers. The payment of such tax or penalty shall give no right to engage in the manufacture or sale of such liquor, or relieve anyone from criminal liability, nor shall this Act relieve any person from any liability, civil or criminal, heretofor or hereafter incurred under existing laws."

In addition to the provision in the Federal Law, that existing laws are to be repealed only to the extent of the inconsistency in the law, the above provision specifically retains and makes operative laws imposing a very heavy tax upon persons who sell or make liquor in violation of law. It has been contended that a law imposing a tax upon an outlawed traffic is void, because the entire beverage intoxicating liquor traffic is prohibited by a Constitutional Amendment. The courts have consistently sustained these laws, even though the purpose of the law was manifestly to discourage and prevent the continuance of the traffic.

The rule of the Court applying to the collection of these taxes on an outlawed traffic is stated in License Tax Cases,[5] where the Court said:

"There is nothing hostile or contradictory, therefore, in the Acts of Congress to the legislation of the States. What the latter prohibits the former, if the business is found existing notwithstanding the prohibition, discourages by taxation. The two lines of legislation proceed in the same direction and tend to the same result."

The courts have gone on the theory that sometimes a heavy tax is a more certain method of preventing the existence of the traffic than a criminal statute, because of the greater certainty of its collection. In Foster vs. Speed,[6] the Court said:

"A business which is prohibited may be taxed. The imposition of the tax upon an outlawed business is often more efficient in suppressing it than statutes making it a criminal offense."

Judge Cooley, in his work on taxation,[7] said:

"On the other hand, one purpose of taxation sometimes is to discourage the business and perhaps put it out of existence."[8]

The above decisions and the reasons given therefor justify the conclusion that State Prohibition restrictive or tax laws which do not attempt to legalize or permit what the Federal Prohibition Code prohibits are valid and enforceable.[9]

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(5) 5 Wall 462, 475.

(6) 120 Tenn. 470.

(7) 3 Ed. 242.

(8) See also Lyle v. Sears, 65 U. S. 49.

(9) Just as we go to press two important decisions were handed down; one by the Supreme Court of Georgia in Jones v. Hicks, 104 S. E. 771, and the other by the Supreme Court of Texas in Ex Parte Gilmore (not yet reported), both holding that Volstead Act does not repeal or modify state prohibition laws.

LIABILITY OF RESTAURANT KEEPER FOR SERVING DELETERIOUS FOOD.

Introductory—The Weight of Authority.—The majority of the decisions, commonly called the weight of authority, in this country hold that at common law one who sells food for immediate consumption on his premises is not an insurer nor a warrantor of the wholesomeness or fitness for human consumption.[1]

Why this is true, our reason fails to inform us. The purchase of such food and

(1) Travis v. Louisville & N. R. Co., 183 Ala. 415, 62 So. 851; Loucks v. Morley, Cal. App., 179 Pac. 529; Merrill v. Hodson, 88 Conn. 314, 91 Atl. 533, L. R. A. 1915B 481, Ann. Cas. 1916D 917; Sheffer v. Willoughby, 163 Ill. 518, 45 N. E. 253, 34 L. R. A. 464, 54 Am. St. Rep. 483; Bigelow v. Maine C. R. Co., 110 Me. 105, 85 Atl. 396, 43 L. R. A. (N. S.) 627; Valeri v. Pullman Co., 218 Fed. 519.

its preparation are wholly in the hands of the seller, and the purchaser has no opportunity to inform himself as to its fitness for the use for which it has been prepared. The consequences of serving unwholesome or poisonous food may be swift and fatal to the consumer, who is in no wise at fault. Still, these cases hold, that so far as any warranty is concerned, the consumer takes his chances. The dispenser merely places the food before the customer, to whom he has extended an invitation to come and eat, with the understanding that he takes it "as is," and if it kills him he is unfortunate for having eaten it. There is no warranty that it is in any respect fit for the specific purpose for which it is sold. If one purchases a piece of machinery for a specific purpose there is an implied warranty that it is reasonably fit for that purpose; but if one purchases food to be served and eaten at once, he does so upon his own responsibility, "he takes his life in his own hands," in using that food for the specific purpose for which it was purchased.

These cases seem to go back to the older English cases which hold that liability on the part of a person serving food and drink depends upon his knowledge of its unwholesomeness, or because it was in violation of an ancient statute which imposed a penalty for furnishing such food and drink.

In a leading English case, it was held that where a farmer bought in the pubilc market the carcass of a pig for consumption as food, and afterwards sold it to another without warranty, although it was unfit for human consumption, no warranty of soundness was implied by law between the last seller and the purchaser.[2]

The courts have attempted to create a distinction between restaurant keepers and retail dealers who have themselves manufactured or prepared the articles of food which they sell, whether for immediate consumption on the premises or not. Thus, for instance, in a Massachusetts case it is stated that "the rule now established in England is that, in the sale of an article of food by one not a dealer, there is no implied condition or warranty that it is fit to be eaten."[3]

So, a passenger on a railroad train, made sick by eating spoiled oysters in a dining car, could not recover on an implied warranty of fitness.[4]

Nor was there any implied warranty as to canned asparagus served on a railroad dining car.[5]

There is authority to the effect that, when food is furnished to a guest by the keeper of a restaurant or inn, the transaction does not constitute a sale, that the title to the food does not pass, that the customer may consume so much as he pleases, but that he cannot carry away of the portion ordered that which he does not eat, or give or sell it to another. It may be that this rule is responsible for some of the erroneous reasoning in later cases.[6]

Undoubtedly the restaurant keeper had title to the food before it was served to the customer. We must assume, in justice to him, that he did. And as the title did not pass to the guest who consumed it, the host is still the owner. It may be that the guest merely becomes a bailee of the food, as he does not become the owner. There has been no sale, no passing of title. But as bailee it is incumbent upon him to

(2) Burnby v. Bollett, 16 M. & W. 644, 153 Eng. Reprint 1348, 11 Jur. 827, 17 L. J. Exch. (N. S.) 190.

(3) Farrell v. Manhattan Market Co., 198 Mass. 271, 280, 84 N. E. 481, 15 L. R. A. (N. S.) 884, 21 Am. Neg. Rep. 142, 15 Ann. Cas. 1076, 126 Am. St. Rep. 436.

(4) Travis v. Louisville & N. R. Co., 183 Ala. 415, 62 So. 851.

(5) Bigelow v. Maine C. R. Co., 110 Me. 105, 85 Atl. 396, 43 L. R. A. (N. S.) 627.

(6) As authority for the rule, see Beal on Innkeepers, sec. 169; Parker v. Flint, 12 Mod. 254, 88 Eng. Reprint 1303; Loucks v. Morley, Cal. App., 179 Pac. 529; Merrill v. Hodson, 88 Conn. 314, 91 Atl. 533, L. R. A. 1915B 481, Ann. Cas. 1916D 917. There is good authority, on the other hand, holding such a transaction to be a sale. Friend v. Child's Dining Hall Co., 231 Mass. 65, 120 N. E. 407, 5 A. L. R. 1100; Barrington v. Hotel Astor, 184 App. Div. 317, 171 N. Y. Supp. 840.

exercise reasonable diligence for the preservation of the food while it is in his possession, and to return it without injury or damage and without loss upon demand of the owner.

Warranty of Restaurant Keeper Under this View.—In an Alabama case, it is said that a restaurant keeper warrants that the food which he serves in his restaurant belongs to that *class* of food which is generally accepted to be fit for ordinary human consumption, and that he has used, in the selection and preparation of his food, that degree of care which the law exacts of those who follow his occupation for a livelihood.[7]

One may assume from the above rule that, if a customer, who has been injured by eating unfit food in a restaurant, can show that the restaurant keeper failed to exercise the required degree of care in preparing such food, that is, that the restaurant keeper was negligent, he can sue him for breach of the implied warranty stated in the Alabama case.

The Better View.—The rule that appeals to one's reason as sane and logical was followed in a comparatively recent case in Massachusetts. In that case it was held that the plaintiff could recover for injuries due to the beans which she had ordered in defendant's restaurant containing stones similar in size and appearance to the beans. The court laid down the rule that it is an implied term in every sale of provisions by a dealer for immediate use, where the selection is not made by the buyer, that the food is fit for consumption, and that this rule applies to food furnished by the keeper of a restaurant to a patron, to be consumed on the premises.[8]

The following quotation is from the opinion in this case: "It would be an incongruity in the law amounting at least to an inconsistency, to hold with reference to many keepers of restaurants who conduct the business both of supplying food to guests and of putting up lunches to be carried elsewhere, and not eaten on the premises, that, in case of want of wholesomeness, there is liability to the purchaser of a lunch to be carried away, founded on an implied condition of the contract, but that liability to the guest who eats a lunch at a table on the premises rests solely on negligence. The guest of a keeper of an eating house or of an innkeeper is quite as helpless to protect himself against deleterious food or drink as is the purchaser of a fowl from a provision dealer. The opportunity for the innkeeper or restaurant keeper who prepares and serves food to his guest, to discover and provide against deleterious food, is at least as ample as is that of the retail dealer in foodstuffs. The evil consequences in the one case are of the same general character as in the other. Both concern the health and physical comfort and safety of human beings. On principle and on authority it seems to us that the liability of the proprietor of an eating house to his guest for serving bad food rests on an implied term of the contract, and does not sound exclusively in tort, although of course he may be held for negligence, if that is proved. Even if there were no common-law authority, it would not be practicable to establish a distinction upon this point which could be supported in reason, between the liability of a retail dealer in meat for immediate consumption and of a victualer who serves food to guests to be eaten forthwith at his own table. Every argument which supports liability of the former tends to sustain liability of the latter with at least equal cogency. They appear to us to rest upon the same footing in principle."

In a case decided in New York, by the Appellate Division of the Supreme Court, it was held that, where a person enters a restaurant and orders certain food which is furnished by the hotel keeper, there is a sale, and the hotel keeper impliedly warrants

(7) Travis v. Louisville & N. R. Co., 183 Ala. 415, 424, 62 So. 851.

(8) Friend v. Child's Dining Hall Co., 231 Mass. 65, 120 N. E. 407, 5 A. L. R. 1100.

that the food is wholesome to eat, contains no deleterious matter and is the food ordered. Hence, a person who ordered a stew in the defendant's restaurant and became ill on discovering that it contained a mouse which had been partially chopped up, he is entitled to recover upon the hotel keeper's implied warranty that the dish contained no ingredients beyond those ordinarily placed therein.[9]

Food Manufactured by Restaurant Keeper.—In a New York case the Court of Appeals of that state has held that a druggist who sold impure ice cream to a customer for immediate consumption on the premises was liable on an implied warranty of fitness. In this respect the court attempts to draw a distinction between this case and cases involving restaurant keepers, in that in the instant case the druggist manufactured the ice cream. The court said: "In this connection however, it must be borne in mind that we are not dealing with the liability of hotel proprietors, restaurant keepers, dining car managers, or people engaged in business of that kind, but are considering solely the liability of a dealer who makes or prepares the article that he is selling."[10]

There may be a broad distinction between the case of a druggist or other person who buys the several ingredients and makes them into ice cream, and that of a restaurant keeper who assembles the various ingredients of a meat croquette, which he serves to a customer, but such distinction carries with it no difference in legal principle.

Liability for Negligence. — The care required of a restaurant keeper in the selection and preparation of food, is stated in an Alabama case as follows: "The law requires that, in the selection of the food for his restaurant and in cooking it for his customers, he shall exercise that same degree of care which a reasonably prudent man, skilled in the art of selecting and preparing food for human consumption, would be expected to exercise in the selection and preparation of food for his own private table. If, in the selection of such food or in preparing it for his customer, the keeper of a restaurant does not exercise that care, and through such want of care his customer who eats the food so selected and prepared is thereby made sick, then he is liable to such customer for the damages so suffered by him."[11]

In Connecticut and Illinois it is held that an action of negligence is the only remedy for the consequences of eating unwholesome food supplied by a restaurant keeper in the regular course of his business.[12]

Under Sales Statutes. — Where a customer is furnished food in a restaurant for immediate consumption, there is no implied warranty of the fitness of the food for consumption, under a statute creating an implied warranty in respect to those who make a business of selling provisions "for domestic use."

"'Domestic' means 'belonging to the house or household; concerning or relating to the home or family.' It is the place where the food is eaten or drunk, rather than the fact that it is food or drink, that determines whether its use is a 'domestic' use or not."[13]

"The furnishing of food and drink by a restaurant keeper to a customer for his immediate consumption upon the premises, does not involve a sale of the food, either at common law or under our Sales Act, which is practically declaratory of the pre-existing law; and therefore section 15 of the Act, relating to an implied warranty of quality or fitness of an article sold, can

(9) Barrington v. Hotel Astor, 184 App. Div. 317, 171 N. Y. Supp. 840. To the same effect are Muller v. Child's Co., 185 App. Div. 881, 171 N. Y. Supp. 541; Leahy v. Essex Co., 164 App. Div. 903, 148 N. Y. Supp. 1063.

(10) Race v. Krum, 222 N. Y. 410, 118 N. E. 853, L. R. A. 1918F 1172.

(11) Travis v. Louisville & N. R. Co., 183 Ala. 415, 424, 62 So. 851.

(12) Merrill v. Hodson, 88 Conn. 314, 91 Atl. 533, L. R. A. 1915B 481; Ann. Cas. 1916D 917; Sheffer v. Willoughby, 163 Ill. 518, 45 N. E. 253, 34 L. R. A. 464.

(13) Loucks v. Morley, Cal. App., 179 Pac. 529.

afford no foundation for an action, by the customer against the restaurant keeper, which proceeds upon the theory of a sale of the food and seeks to hold the restaurant keeper liable upon the ground that he had impliedly warranted the food ordered to be fit and wholesome."[14]

Burden of Proof—Res Ipsa Loquitur.—If one founds an action against a restaurant keeper on the breach of an implied warranty he must, of course, produce evidence tending to show that the food served him was not wholesome. Whatever evidence shows this fact, proves a breach of the warranty, if one exists.

Under the rule followed by most of the courts, one who has been injured by eating unfit food in a restaurant, has the burden of showing that he was served with such food through the negligence of the restaurant keeper.[15]

Does the rule *res ipsa loquitur* apply in such cases, founded upon negligence? Will the fact that the preparation of the food was wholly in the hands of the defendant, and that in the serving of food in public places where reasonable care is used it is unusual for deleterious food to be served, bring to such cases the application of this rule? It seems that it should.

Are we to apply this rule in case of a railroad passenger who is injured by derailment of the train, and not when he is injured by eating poisoned food in the dining car?

True, the relation of passenger and carrier does not exist as between him and the manager or owner of the dining service, but one who engages in a business holds himself out to the public as being proficient in that business, and when in such business a want of due care is likely to result in serious harm to others, he is held to very exacting care—care commensurate with the seriousness of the consequences likely to follow upon a careless or negligent act or omission.

In an Alabama case it is said that a restaurant keeper is required to exercise the "same degree of care which a reasonably prudent man, *skilled in the art of selecting and preparing food for human consumption,* would be expected to exercise in the selection and preparation of food for his own private table."[16]

He must not only exercise the care of a reasonably prudent man, but also of a man who is *skilled* in such art, and who is selecting food for his own mother, wife, and babies to eat. That is very exacting care, and it is the care of one who is skilled. When, therefore, a customer in a restaurant is injured by eating unwholesome food, the selection and preparation of which was by a person skilled in the art, is there any reason why the *res ipsa loquitur* rule should not apply, and is there not every reason why it should apply?

C. P. BERRY.

St. Louis, Mo.

(11) Merrill v. Hodson, 88 Conn. 314, 91 Atl. 533, L. R. A. 1915B 481, Ann. Cas. 1916D 917.

(15) Travis v. Louisville & N. R. Co., 183 Ala. 415, 62 So. 851; Sheffer v. Willoughby, 163 Ill. 518, 45 N. E. 253, 34 L. R. A. 464, 54 Am. St. Rep. 483.

(16) Travis v. Louisville & N. R. Co., 183 Ala. 415, 424, 62 So. 851.

USURY—TAKING INTEREST IN ADVANCE.

CAIN v. STACY, et al.

Supreme Court of Arkansas. Nov. 8, 1920.

225 U. S. 18.

Taking the highest rate of interest in advance on negotiations having not more than 12 months to run is not usury.

I. J. Stacy brought this suit in equity against W. R. Cain to obtain judgment upon a promissory note and to foreclose a mortgage given to secure the same.

The answer sets up the defense of usury. On the 15th day of May, 1919, W. R. Cain executed to I. J. Stacy a mortgage on certain chattels to secure an indebtedness of $4,000, evidenced by a promissory note bearing interest at the rate of 10 per cent per annum from date until

paid. The mortgage was given by Cain to Stacy to obtain a loan of $4,000 to be used in raising a rice crop. The parties also entered into a written agreement, reciting the execution of the mortgage, and agreeing that the money should be deposited with the Bank of Augusta & Trust Company, to the credit of Cain-Stacy rice account, and that no checks drawn thereon should be valid until signed by said Stacy.

It was further agreed that Stacy, if he saw fit, might take charge of the rice crop and manage the same, and that the cost thereof should be charged against the rice crop, and paid out of the proceeds arising from the sale thereof. It was further agreed that in any event the said Stacy should receive a reasonable compensation for his services, and that he might have the rice crop shipped in his name, and ship and sell it when he so desired. During the season of growing the crop Stacy was paid $50 per month for his services for a period of five months. Thus far the facts are undisputed.

According to the testimony of W. R. Cain, Stacy drew a check in advance in his own favor for the first six months interest at the time the money was deposited in the bank to the credit of the Cain-Stacy rice account. The parties also agreed at that time that Stacy should receive a salary of $50 a month for five months. It was the understanding that in this way Cain would pay to Stacy 25 per cent interest per annum for the loan. In other words, the employment of Stacy and the payment of the $200 interest in advance were for the purpose of enabling Stacy to avoid the usury laws, it being the understanding between the parties that in this way Stacy should receive 25 per cent per annum interest on the loan. Cain did not agree to pay $50 per month to Stacy for any assistance and advice in cultivating the rice crop. Stacy did nothing to assist Cain in cultivating the rice crop, except to lend him the $4,000. Cain never saw Stacy on the farm while the rice was being grown. Cain made arrangements with a certain coal company to furnish him with coal, and when he needed coal he asked Mr. Stacy, who was one of the stockholders of the company, to call the company over the telephone and order a car of coal for him. Cain admitted that he sometimes drank to excess, but said that he drank very little during the year 1919. None of the checks drawn on the rice account were countersigned by Stacy.

According to the testimony of Stacy, he was president of the bank in Augusta in which the Cain-Stacy rice account was placed. Stacy loaned Cain $4,000, which he had borrowed for Cain from a friend in St. Louis, and took a chattel mortgage from Cain to secure the debt. He required the account to be placed in the bank of which he was president, and to be designated as the Cain-Stacy rice account, because he wanted to have control of checking out the same, so that he might see that it was used to make the rice crop and for no other purpose. He did not sign the checks himself, because he was in the bank and knew what each check was drawn for. He at all times during the season advised with Cain about the expenditure of the money, and knew that each check was applied to the cost of making the rice crop. Cain had been in the habit of drinking very heavily, and Stacy thought that he would have to give him a good deal of help and advice about cultivating and gathering the rice crop. For this service he was to be paid at the rate of $50 a month for five months. It was on account of the hazard and the services Stacy was to render that Cain agreed to pay him this $50 per month.

Stacy was asked what he meant by using the word "hazard" in this connection, and answered that Cain was accustomed to get drunk, and was not able to supervise or work the rice crop while in this condition. Cain did get drunk a number of times during the crop season, and Stacy earned his compensation of $50 per month. Stacy was a stockholder in a coal company, and saved Cain at least $25 per car by supplying him the coal through the company of which he was a stockholder. Stacy purchased four cars of coal for Cain in this way.

The cashier of the coal company corroborated the testimony of Stacy about the purchase of the coal. Cain rented the land on which the rice crop was grown from R. B. McKnight. McKnight testified that Stacy approached him to take over Cain's rice crop if it became necessary. McKnight had seen Cain in a drunken condition frequently, but very little during the year 1919.

The chancellor found the issues for the plaintiff Stacy, and gave judgment in his favor against the defendant, Cain. It was also decreed that the mortgage should be foreclosed. The case is here on appeal.

HART, J. (after stating the facts as above).

The first ground of usury relied upon by the defendant is that the notes bore 10 per cent interest per annum from date until paid, and that the plaintiff took out $200, the first 6 months' interest, in advance.

In Ellis v. Terrell, 109 Ark. 69, 158 S. W. 957, Ann. Cas. 1915C, 1153, and in Bank of Newport v. Cook, 60 Ark. 288, 30 S. W. 35, 29 L. R. A. 761, 46 Am. St. Rep. 171, the court held that

the taking of the highest rate of interest, in advance, on negotiations having not more than 12 months to run, is not usury.

Another ground for the alleged usury is that by the written agreement of the parties the payment to Stacy for his services in connection with the rice crop was a contrivance between the parties by which more than the legal rate of interest was to be secured to Stacy. If Stacy exacted of Cain as part of the consideration of the loan that Cain should employ him at an exorbitant price when his services were not needed, and were not in fact to be rendered, the contract would be usurious. The form of the contract is immaterial if the intent exists at the time the contract is made to take and receive usurious interest. Habach v. Johnson, 132 Ark. 374, 201 S. W. 286.

We are of the opinion that the decree must be affirmed.

NOTE—*Reserving Interest in Advance as Working Usury.*—The instant case does no more than define the period a loan is to run so as to make it a short time loan and, therefore, under the ruling in Arkansas to permit the interest to be taken out, in a loan to bear the highest rate allowed by law. Generally it was held that interest may be taken by way of discount in North Carolina, for short periods. Crowell v. Jones, 167 N. C. 386, 83 S. E. 551. But in Howell v. Pennington, 118 Ga. 494, 45 S. E. 272, the point was reserved and in Patton v. Bank of Lafayette, 124 Ga. 965, 53 S. E. 664, 5 L. R. A. (N. S.) 592, 4 Ann. Cas. 639, it was held not usurious to take out the interest, where days of grace have not been counted, because calculation to include them made the interest lawful. In a later Georgia case, Loganville Bkg. Co. v. Forrester, Ga. 84 S. E. 961, L. R. A. 1915D 1195, it was ruled that whether a loan be for a short or long term reserving interest at the highest rate made it usurious. The Court said: "In many jurisdictions a rule has been evolved that interest may be taken in advance on short term paper without rendering the transaction usurious. This rule of law is said to have arisen out of the custom and practice of banks. * * * The practice grew up for bankers to require payment of bank discount in addition to highest rate of interest." Then some English cases are cited and it is said: "Perhaps a majority of the American courts are in line with the English decisions, and extend to individuals the same privilege of discount, as affecting the interest demanded in advance, as is followed by the usage of banks. But our statute expressly forbids an increase of the maximum interest rate by way of discount."

In Parvis v. Frink, 57 Fla. 519, 49 So. 1023 it was held that where a statute forbade debtor being required to pay a greater interest than 10 per cent per annum it was usurious to provide for a quarterly interest for 10 per cent.

And so in Hiller v. Ellis, 72 Miss. 701, 18 So. 95, 41 L. R. A. 707, it is held that usury was to be above what is to be computed on the principal sum and this cannot be evaded by reservation of interest in advance where the maximum interest allowed is contracted to be paid.

However, many cases, without the question of long or short term being adverted to, hold it is lawful to take interest out in advance without this making the contract usurious. For example see Cobe v. Guger, 237 Ill. 516, 86 N. E. 1071; Bramblett v. Deposit Bank, 122 Ky. 324, 92 S. W. 283, 6 L. R. A. (N. S.) 612.

In Sandford v. Lundquist, 80 Neb. 414, 114 N. W. 279, 18 L. R. A. (N. S.) 633, the Court reasons quite extensively along the line that compound interest does not work usury and it construes the Nebraska statute as permitting this when it says: "Which rate of interest so agreed upon may be taken yearly, or for a shorter period, or in advance, if so expressly agreed."

Of course the measure of what constitutes usury is the statute, but it does seem a little difficult to understand how it can be said, for example, that $100 is loaned, when only $94 cash goes from lender to borrower and therefore 6% would not amount to $6.00 on $94.00. It is recognized everywhere that no sort of device can excuse the exaction of what is usury. The statutes, however, differ so greatly on this subject, that a general principle is difficult to formulate. Lawful interest is a question in each jurisdiction.

C.

ITEMS OF PROFESSIONAL INTEREST.

WHAT CONSTITUTES THE PRACTICE OF THE LAW.*

In the conduct of modern business, lawyers are frequently called upon to exercise functions which do not strictly come under the description of legal services. Everything done by a lawyer is not necessarily the practice of law. On the other hand, the term "practice of the law" has come to have a more or less well defined meaning as designating not only those functions peculiar to lawyers, the performance of which by a layman is generally regarded as against public policy, but it includes all the work of the modern advocate, such as appearances before public service and interstate commerce commissions, boards of arbitration and other modern tribunals—in short, wherever the lawyer's services as advocate are utilized, he is *practicing law.* But besides serving as advocate, the lawyer serves as adviser and coun-

[*This report of the New York County Lawyers' Association was incorporated in a report of a similar committee of the American Bar Association and may therefore be said to represent the best professional opinion.—Ed.]

selor. In this country he occupies both the office occupied by the English solicitor and by the English barrister. Accordingly, "practice of the law" by lawyers in this country includes, besides the work of the advocate, the giving of advice as a lawyer, covering statutes, documents, corporate or private organizations—indeed, concerning the duties and obligations under the law of every conceivable form of human relationship, as well as the fixing of such duties and relationships in legal form, by contracts, charters, deeds, wills, articles of incorporation, co-partnership, statutes, etc., etc., and the representation, as a lawyer, of clients and the protection of their interests. Thus broadly stated, practicing law includes everything done in modern times by the professional legal advocate and adviser in his professional capacity. It includes, of course, conveyancing, and insofar as knowledge of the law is applied to accounting, the preparation of income tax returns, forms of bookkeeping, financial statements, etc. etc.

Many of these things may be done also by laymen. When so done they do not necessarily involve practice of the law, unless the layman does them as a practice for others, holds himself as qualified to do them, or represents himself as entitled to practice law or as qualified to perform such acts and to advise concerning their legal effect. Thus, though any man may draw his own contracts, deeds, leases or mortgages or income tax returns, and may call to his aid his bookkeeper or any other person, the person he so calls to his aid, if such person holds himself out generally as qualified to perform the service of drafting such documents in proper legal form or as qualified to give a legal opinion as to their validity or efficacy, is said to be *practicing law*. Thus a notary public who professes skill in drafting legal documents is practicing law.[1] Of course, if the actual service of a lawyer is rendered in the performance of the task, the layman furnishing such service is practicing law—he is offering the service of persons presumably qualified to give expert advice in the field of the law. Thus the trust company which employs a lawyer to draw for the customer of the trust company his will or other legal documents, is practicing law. The title company which employs a lawyer to draw for its customers deeds or mortgages or to give advice concerning the law is practicing law. In the case of the title company, the only inquiry is whether or not it makes a practice of doing such things,[2] and whether it does these acts unconnected with and disassociated from its insuring of a title. Whether or not drawing the contract for a sale which is to be the basis of the title it subsequently expects to insure is unlawful practice is still a moot question,[3] though in our opinion the drawing of such a contract is not so connected or associated with the insuring of the title as to bring it within the exception to the rule. The drawing of a deed or satisfaction piece to perfect the title presents a close question, yet undetermined; but clearly the bringing of suits or proceedings to clear titles is not within the insuring function of a title company.

The defense of litigation by casualty companies upon policies issued by them falls into a different grouping. As surety, the company defends *its* rights, not the insured, appearing for the insured as the party defendant only as the individual surety appears in litigation for the principal to safeguard its rights as surety. The right so to appear is part of the well-settled law of principal and surety. The corporate character of the surety does not change the principle.

Corporations cannot, unless specially permitted by the Legislature, practice law. This was made clear by Judge Vann in the Co-operative Law Publishing Co. case, and was the law before the penal prohibition of such practice. The statute merely confirmed the common law and made penal what was theretofore *ultra vires*.

The line between what one may freely do for oneself as one's own lawyer and what one may not do is not always clear when the "oneself" is an association or group of individuals, as in the case of trade groups such as employers' associations, trades unions, credit or adjustment bureaus and the like. Such groups have common or group purposes. In the service of such common purposes, the services of lawyers may be collectively employed. Thus, to establish or defend a principle of law or a policy common to all, the association, union or group may have its lawyer. But when this requires representation of the individual member in court, difficulties arise, varying with the facts and circumstances of each particular case, but the principle involved, that is, that to sell, or offer for sale, the service of a lawyer to an individual client, is to engage in the *practice of the law*, remains clear. The group, as in the case of a committee of bondholders or stock-

(1) People v. Alfani, 186 App. Div. 468.
(2) People v. Title Guarantee & Trust Co., 168 N. Y. Supp. 278.
(3) Gauler v. Solicitors' L. & T. Co., 9 Pa. Co. Ct. R. 634, and People v. Title Guarantee & Trust Co., 191 App. Div. 165, now on appeal.

holders of a corporation, is entitled to have counsel and professional services for the benefit of the collective body, and the services may be beneficial to all the bondholders or stockholders as the case may be, but the attorney is still the attorney for the group, association or corporation, as the case may be.

Difficulty of application of the principles rather than in their definition occurs again in the case of collection agencies. Undoubtedly it is not improper for a layman to collect or adjust an account for another. But if he must employ a lawyer to do it, or if he must enter court (either before or in bankruptcy proceedings) he goes beyond the layman's field and offers services, qualifications for which require lawyer's training and experience and professional responsibility. When this is given, the collection agency is practicing law. In forwarding claims to receiving lawyers, does it practice law? If the agency is the directing principal and the lawyer is its employe, it surely is practicing law. If it acts merely as the transmitting agent of the client and the relationship subsequently between the client and the lawyer becomes one of client and lawyer—"personal and direct," as the cases define it—then, of course, the agency is not practicing law. The question is simple—Who is the lawyer's client, the agency or the agency's customer? Does the client know the lawyer, or does he only know the agency? These present questions which in each case are to be answered upon the facts. The difficulty is not with the principle. Practicing law includes the service of lawyers, and whenever such services are furnished, dealt in, or offered as part of the service of a layman, the layman is truly practicing law.

We conclude, therefore, that it is improper for laymen or corporations to furnish legal services, to give legal advice, to furnish the services of lawyers, as well as to appear in court for others in the assertion of legal rights, and as a matter of practice to draw legal documents. In the case of individuals it is against public policy and contracts based thereon are invalid. In the case of corporations it is both against public policy and *ultra vires*. Where forbidden by statute (as is the case in many states) it is also *unlawful*.

JULIUS HENRY COHEN,
HARRY W. MACK,
MARTIN CONBOY,
Special Committee of the New York County Lawyers' Association.

HUMOR OF THE LAW.

"Now we want only one more delegate to insure the nomination. Wiggs, can't you bring influence to bear on a delegate you know?"

"I wouldn't dare to try. The only delegate I know is my wife."—*Baltimore American.*

"Motorists," says a London magistrate, "cannot go about knocking people down and killing them every day." We agree. Once should be enough for the most grasping pedestrian.—*London Punch.*

Judge: "At that time, where were your accomplices?"

Prisoner: "My what?"

Judge: "Where were your supporters in this crime?"

Prisoner: "I had them on, Judge."—*Stanford Chaparral.*

When I cast off my earthly cares,
I don't suppose that I shall grieve
If those who claim to be my heirs
Contest whatever will I leave.
And yet, as down the hill I go,
It brings me pleasant peace of mind
And comforts me no end, to know
That they'll do nothing of the kind.

A crafty lawyer might, it's true,
Interpret things I've done and said
As showing that I had a few
Revolving discs inside my head.
I've worn sport shirts; I've bet on Yale;
Searched comic operas for the plot;
Sent urgent letters through the mail—
Which strong, hard headed men do not.

It might quite easily be shown
That I've been often indiscreet,
In fact that I've been sometimes known
To buck the ponies, and the Street,
To give back talk to traffic cops,
To try to drink the sort of brew
That's made at home from malt and hops—
Things men of judgment do not do.

But while the heirs I leave behind
May urge, with quite a show of truth,
That I have been of unsound mind
Since I was but a callow youth.
It does not worry me a lot
Because I know, when I pass out
For good and always, there will not
Be any coin to fight about.

J. J. MONTAGUE in *St. Louis Post-Dispatch.*

WEEKLY DIGEST.

Weekly Digest of Important Opinions of the State Courts of Last Resort and of the Federal Courts.

Copy of Opinion in any case referred to in this digest may be procured by sending 25 cents to us or to the West Pub. Co., St. Paul, Minn.

1. **Adoption**—Judicial Proceedings.—Judicial proceedings are not essential to the validity of statutes providing for the adoption of minors.—In re Camp 24, 111 Atl. 565.

2. **Bankruptcy**—Claims.—The fact the buyer of claims of a bankrupt against the United States was the former manager of the bankrupt, who had more knowledge of the merit of the claims and more confidence of ultimate success than the creditors, does not require the sale to be set aside, where there was no fraud or concealment, and the creditors had opportunity to ascertain for themselves the situation of the claims.—Bray v. United States Fidelity & Guaranty Co., U. S. C. C. A., 267 Fed. 533.

3. **Banks and Banking** — Forgery.—Where cashier of defendant bank sought plaintiff to make a loan to one H., taking in return a note with H. as principal and the cashier as surety, the bank was liable to plaintiff for paying the check for amount of loan payable to H to the cashier, where he had forged the indorsement of H on the check and also forged the note.—First Nat. Bank of Ocilla v. Harris, Ga., 104 S. E. 574.

4.——Liability of Stockholders.—Rendition of a judgment against a national bank, which has gone into voluntary liquidation, and the return of an execution thereon unsatisfied, fixes the liability of the stockholders for its payment, and a cause of action against them accrues from the date of such return.—Warner v. Citizens' Nat. Bank, U. S. C. C. A., 267 Fed. 661.

5. **Bastards**—Presumption of Legitimacy.—The presumption that a child born in wedlock is legitimate applies to a child conceived before the marriage, though in such case it may not be as strong as in other cases.—Jacobs v. Jacobs, Ark., 225 S. W. 22.

6. **Bills and Notes**—Bona Fide Purchaser.—Under Negotiable Instruments Act, § 56, requiring actual knowledge of the infirmity, or knowledge of such facts as make the taking bad faith to constitute notice of the infirmity in the instrument, the existence of circumstances calculated to excite suspicion in the mind of a prudent man does not prevent recovery by a bona fide purchaser.—Mechanics' Sav. Bank v. Berry, Me., 111 Atl. 533.

7.——Caveat Emptor.—The rule of caveat emptor applies to the transfer of non-negotiable instruments.—Simons v. Porterfield, Cal., 192 Pac. 172.

8.——Compromise.—A compromise and settlement of matters in dispute, after full and fair negotiation, is binding on the parties, and an acceptance given by one in execution of the settlement is not open to defense.—Nissen v. First Nat. Bank, U. S. C. C. A., 267 Fed. 689.

9.——Delay in Presentation.—Inexcusable delay in presenting a check for payment will discharge an indorser from liability thereon if the check is not paid, whether he is in fact injured or not.—Muzum v. Sheppard, W. Va., 104 S. E. 587.

10.——Transfer.—Where a note, executed under the Negotiable Instrument Law, is assigned to a third person, a valid consideration is presumed, and in the hands of a holder for value before maturity is not subject to a defense on the ground of failure of consideration.—Despres, Bridges & Noel v. Hough Drug Co., Miss., 86 So. 359.

11. **Brokers**—Estoppel.—While an owner, employing a broker to sell on commission, can stand on the strict terms of the contract, and not vary any of its terms to effect a sale to a customer produced, yet, if he chooses to avail of the customer and make a sale to him on different terms, he is liable for commissions.—Jenkins v. Kay, Mo., 224 S. W. 1028.

12. **Carriers of Live Stock**—Reasonable Diligence.—A carrier is bound to exercise only reasonable diligence in promptly transporting freight to place of delivery, and is not bound to exercise the same degree of care which it must exercise in the safe handling of freight, either animate or inanimate.—Louisville & N. R. Co. v. Crain, Ky., 224 S. W. 1063.

13. **Carriers of Passengers**—Alighting Passenger.—In an action for damages against a street car company for personal injuries inflicted upon a passenger by failure of the carrier to stop its car a reasonably sufficient time to allow the passenger to safely alight, evidence that the passenger was proceeding to get off the car in the usual manner tends to prove that he was alighting with reasonable dispatch. Muskogee Electric Traction Co. v. Cooper, Okla., 193 Pac. 39.

14. **Commerce**—Natural Gas.—The business of a gas company, transporting natural gas by means of pipe lines from gas fields in Pennsylvania to homes, offices, and factories in New York, is interstate commerce.—People v. Saxe, N. Y., 128 N. E. 673.

15. **Constitutional Law** — Arraignment.—Const. U. S. Amend. 14, requiring due process of law, does not, as construed by the United

States Supreme Court, prohibit a waiver by accused of formal arraignment and plea before the trial is entered on.—State v. Prouty, Vt., 111 Atl. 559.

16. **Contracts**—Compounding Felony.—Where a contract is entered into between an attorney and one being prosecuted for crime, whereby a certain amount of money is given to the attorney, part of which is to be used to settle the prosecution, thus compounding a felony, the entire contract is void, and the client cannot recover of the attorney even the portion of the amount paid over to be used for legitimate purposes.—Jones v. Henderson, Ky. 225 S. W. 34.

17.——Intention.—In construing a contract, the intention is to be gathered, not from detached parts, but from the whole of it.—Fechner v. Finseth, N. D., 179 N. W. 701.

18. **Courts**—Foreign Laws.—The recognition of foreign laws cannot be claimed as a matter of right, but only as a favor or courtesy, but the doctrine of comity is permitted and accepted in all civilized states from mutual interest and convenience, and from moral necessity, to do justice that justice may be done in return.—Jerome P. Parker-Harris Co. v. Stephens, Mo., 224 S. W. 1036.

19. **Criminal Law**—Failure to Testify.—The fact that the foreman stated that, if accused had any satisfactory defense, he ought to have gone on the stand, and that other jurors commented on his failure to testify, shows such misconduct of the jury as necessitates the reversal of the case.—Barrow v. State, Tex., 225 S. W. 53.

20.——Good Character.—In a prosecution for murder of defendant's wife, instruction that the jury could take good character into consideration in arriving at their verdict, and that if it generated a reasonable doubt they could acquit, held not open to the objection that good character is a defense by itself, and should be so charged.—Watson v. State, Ga., 104 S. E. 572.

21.——Res Gestae.—Where defendant, a justice of the peace, immediately after the alleged assault and battery issued complaint, warrant and commitment for prosecuting witness for disorderly conduct, such documents were admissible, the false arrest and imprisonment being as much a part of the assault as the original blow, and the steps taken by defendant to make them appear legal were a part of the res gestae.—State v. Hendrickson, N. J., 111 Atl. 542.

22.——Res Gestae.—In a prosecution for murder, statements made by decedent, after he was shot, that defendant had shot and robbed him, held admissible as res gestae.—Solice v. State, Ariz., 193 Pac. 19.

23.——Warrant Commitment.—There is nothing in the office which a commitment is designed to perform requiring a detailed statement of the circumstances attending the commission of the crime, other than the time or place of the alleged criminal act, under Pen. Code 1913, § 885.—State v. Gardner, Ariz., 193 Pac. 22.

24. **Dedication**—Acceptance.—One who lays out a tract of land into lots, streets, and alleys, and offers to dedicate such streets and alleys to the public, may withdraw such offer at any time before the acceptance thereof by the proper public authorities, and, where a part of such dedication has been accepted, the offer may be withdrawn as to the part not so accepted.—City of Point Pleasant v. Caldwell, W. Va., 104 S. E. 610.

25. **Deeds**—Delivery.—Since a deed takes effect only on delivery, where a mother executed deed to her son, and did not deliver it but retained its possession pending reformation in his habits, she could make voluntary gift of the land to the son's wife.—Osborne v. Gillenwaters, Va., 104, S. E. 578.

26. **Divorce**—Jurisdiction.—A decree in a divorce action in another state, which awarded the custody of an infant child to the mother, does not preclude a Kansas court of competent jurisdiction from afterwards making an order changing that custody upon a sufficient showing of a change in the situation of the parties, or where the best interests and welfare of the child will be advanced thereby.—Woodall v. Alexander, Kan., 193 Pac. 185.

27.——Maintenance and Alimony. — Maintenance and alimony are mere incidents of a suit for divorce, and the recovery of either or both should properly be sought in the petition asking a divorce.—Wallace v. Wallace, Ky., 225 S. W. 31.

28. **Easements**—Verbal Agreement.—Where a portion of a parcel of land upon a city street was conveyed by metes and bounds, with the verbal understanding that vendee could use an alleyway on plaintiff's premises to reach the rear of a building, which she was contemplating constructing, and the right to use such alleyway affected the purchase price, and the vendee constructing a building in reliance thereon, and the vendor permitting the use of such alleyway by defendant for some time, the vendee could enforce his right to use such alleyway under the verbal agreement, being actually executed.—Handal v. Cobo & Dosal, Tex., 225 S. W. 67.

29. **Eminent Domain** — Reciprocal Laws.—A city of the second class in this state may in its proprietary right acquire by condemnation in the exercise of the power of eminent domain property for waterworks system within the state of Oregon in view of Laws Or. 1909, p. 256, granting such right; the two states having passed reciprocal laws therefor, providing such law does not violate the Constitution of Oregon.—Langdon v. City of Walla Walla, Wash., 193 Pac. 1.

30. **Equity**—Laches.—The fact that the delay in bringing a cause of action was due to the advice of an attorney of recognized ability that plaintiff had no cause of action is a complete answer to the defense of estoppel and laches, especially where the defendant, by bringing suit on notes held by it, could have secured a settlement of all the issues involved.—Weidenfeld v. Pacific Improvement Co., U. S. C. C. A., 267 Fed. 699.

31. **Estoppel**—Mutuality.—Where a shipowner assigned, as the only reason for its refusal to perform its contract to carry cargoes for libelant, a claim that the outbreak of the war with Germany had abrogated the contract, it could not, at the trial for breach of its contract, defend on the ground that the original contract was invalid for want of mutuality.—Luckenbach S. S. Co., Inc., et al v. W. R. Grace & Co., U. S. C. C. A., 267 Fed. 676.

32.——Rule of Law.—The grantee of an estate in fee simple may thereafter be estopped from denying that he conveyed such an estate, and this on the principle that, when a man has by his deed averred or affirmed or covenanted, or by his act admitted, that a fact is true, he shall not afterward be permitted to deny or contradict or disprove it.—Weaver v. Drake, Okla., 193 Pac. 45.

33.——Waiver.—A "waiver" is the intentional abandonment or relinquishment of a known right.—Smith v. New York Life Ins. Co., N. Mex., 193 Pac. 67.

34. **Evidence**—Instructions.—A manufacturer of a grade of flour that is known by him to be extensively used by bakers in making bread, and who sells that grade of flour under a certain name, warrants that the flour sold by him under that name is of the grade and character described thereby, and warrants that it will make bread; and if flour that will not make bread is sold to a dealer under that name, the seller is liable for the damages thereby sustained by the purchaser, and in instruction to the jury to that effect is not erroneous.—Kaull v. Blacker, Kans., 193 Pac. 182.

35. **Execution**—Levy.—There is a failure to keep good a levy on goods in a store, thus letting in a chattel mortgage, made and recorded after the levy, but before such failure, the articles not being inventoried and marked or removed, but remaining in the store; the owner retaining possession of the key, and the person placed in charge as keeper by the officer staying in another part of the city at night.—Smart v. Sosey, Cal., 193 Pac. 167.

36. **Fraudulent Conveyances**—Equity.—If the legal or equitable owner of land causes the same to be conveyed to another in trust for him, for

the purpose of covering up his property and hiding it from his creditors, present or future, equity will decline to enforce such trust, either at the suit of such owner or that of his heirs after his death.—Spaulding v. Spaulding, W. Va., 104 S. E. 604.

37. **Highways**—Law of Road.—The evidence is sufficient to sustain the finding that the driver of the automobile negligently failed to turn to the right as required by the law of the road.—Morken v. St. Pierre, Minn., 179 N. W. 681.

38.——Public Square.—Where a public square or place is so connected with the highway as to be substantially a portion of the highway, a public easement may be acquired by adverse user, when the occupation is so general and of such kind as to apprise the owner that the public is exercising control over his property as a matter of right.—Hoggard v. Mitchell, N. C., 104 S. E. 561.

39. **Homicide**—Bad Moral Character.—In a prosecution for homicide, evidence of the bad moral character of the deceased was not competent, where it did not illustrate any issue in the case, and no dying declaration of the deceased was offered in evidence.—Stacey v. Commonwealth, Ky., 225 S. W. 37.

40.——Dying Declaration.—A dying declaration may be discredited by showing that the declarant has been convicted of a felony or other crime involving moral turpitude.—Liddell v. State, Okla., 193 Pac. 52.

41.——Self-Defense.—A private citizen, while engaged in making an unlawful arrest and restraining the person arrested by threats with a pistol, loses the right of perfect self-defense, and cannot insist on instructions covering such right in a prosecution for killing the arrested person.—Rutland v. State, Tex., 224 S. W. 1088.

42.——Specific Intent.—One may by reckless shooting be guilty of murder of person killed thereby without specific intent.—Haynes v. State, Tex., 224 S. W. 1100.

43. **Husband and Wife**—Account Stated.—Where goods were sold to husband only, and not wife, and there was nothing to show that the goods were of the character mentioned in Rev. Codes, § 3707, or that wife was chargeable therefor, wife was not liable on an account stated by seller and husband.—Thos. O. Hanlon Co. v. Jess, Mont., 193 Pac. 65.

44.——Estoppel.—Wife, who conveyed half interest in property to husband, was not precluded from bringing action to cancel deed by the fact that land had been sold for taxes and resold by tax sale purchaser to husband, since a deed to husband may be treated as redemption deed, and inured to wife's benefit.—Moore v. Moore, Tex., 225 S. W. 78.

45. **Injunction**—Status Quo.—It is not necessary that the proof should establish with absolute certainty the impairment of a right to justify the court in granting a temporary injunction which merely maintains the status quo until the final hearing.—Sutherland v. City of Winnsboro, Tex., 225 S. W. 63.

46. **Interpleader**—Conflicting Bids.—Where each of two bidders claimed to be the purchaser of a vessel offered for sale by the government, a bill of interpleader held properly filed by the United States, which still retained possession of the vessel.—United States v. Levinson, U. S. C. C. A., 267 Fed. 692.

47. **Joint Adventures**—Fidelity Between Members.—When one becomes a member of a group united to prosecute a common enterprise, as the purchase of property, each member owes to every other member the duty of fair, open, and honest disclosure, and no member, by connivance, deceit, or suppression of facts within the right or to the advantage of any other member to know, can secure or accept secret profits, commissions, or rebates, to the disadvantage of others, and he holds gains acquired by his breach of faith for the common benefit of his associates in proportion to their respective interests; a violation of his duty constituting actionable fraud, and the usual remedies being available to the others.—Goldman v. Pryor, Wis., 179 N. W. 673.

48. **Judgment**—Statute of Limitations.—The defense of the statute of limitations is a valid or meritorious one and as such will support the vacation of a judgment.—Berringer v. Stevens, Ark., 225 S. W. 14.

49. **Jury**—Remittitur.—Order for new trial unless remittitur is filed not deprivation of jury trial.—Podgorski v. Kerwin, Minn., 179 N. W. 679.

50. **Larceny**—Resistance.—In a prosecution for theft from the person by snatching the property so suddenly as not to allow time for resistance, evidence that the prosecuting witness resisted and that the money was taken in the struggle or a scuffle, if true, would entitle accused to an acquittal.—Mayzone v. State, Tex., 225 S. W. 55.

51. **Limitation of Actions**—Express Contract.—If there had been an express contract on the part of testatrix to bequeath property to her nephew to pay for his services, the statute of limitations would not begin to run against the nephew's claim until after testatrix's death, but, if there was only an implied contract, limitations would begin to run from time of performance of the services.—Ivey v. Lane, Tex., 225 S. W. 61.

52.——Foreclosure.—Notwithstanding Civ. Code, § 2911, declaring a lien extinguished by lapse of time within which an action can be brought on the principal obligation, the mortgaged property having been conveyed by the mortgagor, the note and mortgage are to be considered as separate contracts, so that, though action on the note be barred, the grantee, having in writing, signed by him, as required by Code Civ. Proc. § 360, acknowledged the existence of the mortgage, it is extended or continued for purpose of mere foreclosure action.—Cotcher v. Barton, Cal., 193 Pac. 169.

53.——Payment of Interest.—A suit on a note was not barred by the statute of limitations, where interest due thereon was paid within the statutory period.—Conley v. Archillion, Ark., 225 S. W. 5.

54.——Starting Point.—Statute of limitations did not begin to run against a broker, so as to bar a right of action for compensation, at the date of his contract for services, but at the date of his furnishing a person ready, able, and willing to make a loan as provided by the contract.—Daniel v. Drury, D. C., 267 Fed. 751.

55. **Master and Servant**—Proximate Cause.—A petition for injuries to employe, hired to grind carding machine, showing that he was injured by getting his hand caught in the cylinder in cleaning waste cotton from the door to the cylinder, and showing that the door had been opened by a fellow servant, held demurrable, as showing act of fellow servant was proximate cause of injury.—Hampton v. Quitman Mfg. Co., Ga., 104 S. E. 576.

56.——Res Ipsa Loquitur.—That an employee engaged in interstate commerce met accidental death by stepping on a chunk of coal upon the steps leading up to a locomotive cab is not prima facie proof of the employer's negligence under the rule of res ipsa loquitur.—Reeves v. Chicago, St. P., M. & O. Ry. Co., Minn., 179 N. W. 689.

57. **Mechanics' Liens**—Bond by Surety.—Proof that the bond of a contractor engaged to construct a church building was found in the custody of the treasurer of the church, who was the official custodian of its papers, the bond itself being duly signed by personal sureties, warrants a finding of delivery.—Alfalfa Lumber Co. v. Hope, Tex., 225 S. W. 81.

58.——Extension for Filing.—Connecting a drainpipe for the plumbing system, though part of the work under the contract, is too trivial to extend the time for perfecting the lien where the time required for that work was not stated, but a charge of only one hour was made for it and for charging the batteries of the water and light system for which no lien could be claimed.—Floreth v. McReynolds, Mo., 224 S. W. 995.

59. **Mines and Minerals**—Partnership.—The relation existing between parties owning shares in a trust to operate an oil company not being that of partners in the ordinary sense, it was not necessary that all shareholders in the association be made parties to a suit between shareholders involving its affairs and seeking accounting, dissolution, etc.—Davis v. Hudgins, Tex., 225 S. W. 73.

60. **Money Received**—Implied Promise.—The mere depositing money to another's account, or

directing one to pay money whch is due him to another, does not of itself raise the implication on the part of the recipient of a promise to repay.—Bailey's Adm'r v. Hampton Grocery Co., Ky., 224 S. W. 1067.

61. **Mortgages**—Defeasance.—In determining whether a deed absolute upon its face was intended by the parties as a mortgage, the court will consider the circumstances of the parties, the property conveyed, its value, the price paid for it, defeasances, verbal or written, as well as the acts and declarations of the parties.—Anderson v. Powell, Ark. 225 S. W. 24.

62.——Subsequent Incumbrancer. — A subsequent incumbrancer can protect his interests by paying the amount of the prior mortgage, after sale on foreclosure to the mortgagee, and taking an assignment of his bid for the property, and the sheriff's deed to the subsequent incumbrancer thereafter conveys full title.—Montclair Savings Bank v. Partridge, N. J., 111 Atl. 547.

63.——Surety.—Where a recorded mortgage and loan secured thereby were for the specified sum of $2,200, the owner could not in any event become entitled to enforce the mortgage for a greater sum than the $2,200, with interest, regardless of the amount paid by it under its obligation as surety for the mortgagor.—Security Trust & Savings Bank v. Fidelity & Deposit Co. of Maryland, Cal., 193 Pac. 102.

64. **Negligence**—Foreseeing Injury.—Though an injury which could not have been foreseen or reasonably anticipated as the probable result of an act of negligence is not actionable, it is not necessary to show that the particular consequences or injury which resulted could have been foreseen, but it is enough that the negligent person should have foreseen injury of some kind.—Sandel v. State, S. C., 104 S. E. 567.

65. **Partition**—Burden of Proof.—While complainant in a suit for partition, in which his title is disputed, must recover on the strength of his own title, it is sufficient for him to show a right to recover against the defendant, and when it appears that both derive title from a common source he need not go behind that source.—Richmond Cedar Works v. Kramer Bros. & Co., U. S. D. C., 267 Fed. 723.

66. **Patents**—Invention.—Commercial success of the patented device, due to a large increase in the demand for the device and to extensive advertising, based largely on claims of excellence not due to the patented invention, is not to be considered as evidence of invention.—Harvey Hubbell, Inc., v. General Electric Co., U. S. C. C. A., 267 Fed. 564.

67. **Pledges**—Equitable Lien.—Where a contract for a pledge fails for want of a delivery of the article agreed to be pledged, such contract, nevertheless, creates an equitable lien, which is valid as between the parties.—Fletcher American Nat. Bank v. McDermid, Ind., 128 N. E. 685.

68. **Prohibition**—Disputed Facts.—While superior courts will ordinarily prohibit an inferior tribunal from exercise of jurisdiction, where, under the undisputed facts, it never had jurisdiction, the writ will not be granted, where the question of jurisdiction depends upon disputed facts, or a disputed question of law.—State v. Circuit Court, S. D., 179 N. W. 691.

69. **Railroads** — Crossing. — The evidence showed that plaintiff's intestate, in attempting to drive his automobile over a railroad crossing, was struck by a train running at a speed of about 35 miles an hour, that after he reached a point in the road 58 feet from the railroad track he had an unobstructed view of the track for a distance of 1,320 feet in the direction from which the train was approaching, that the collision took place in the afternoon of a clear day, that there was a slight upward grade in the road and its surface was sandy, and that there was nothing to distract the attention of the deceased from the oncoming train. Held that ,as a matter of law, he was guilty of contributory negligence. —Anderson v. Great Northern Ry. Co., Minn., 179 N. W. 687.

70.——Licensee.—One having the ordinary power to discern and appreciate danger, who in common with others, uses, with the implied knowledge of the operator, part of a railroad track, elsewhere than at a public crossing, as a pathway for his own convenience, is at most a mere licensee, and as such the company owes him no other or higher duty than it owes a trespasser.—Robertson v. Coal & Coke Ry. Co., W. Va., 104 S. E. 615.

71.——Warning.—It is the duty of those in charge of a train being operated over a railroad in this state, upon approaching a highway crossing, to give the signals required by law, and if a traveler crossing such railway at such crossing is injured by being struck by a moving train which has not given such crossing signals, the operator of such railway will be liable for the resulting injury, unless it appears that the injured party was guilty of contributory negligence in entering upon the crossing under the circumstances of the particular case.—Canterbury v. Director General of Railroads, W. Va., 104 S. E. 597.

72. **Reformation of Instruments**—Mutual Mistake.—Before a deed can be reformed on account of mistake of description, the proof of mistake must be clear, unequivocal, and convincing, and must show that the mistake was common to both parties.—Troupe v. Ancrum, Ark., 225 S. W. 9.

73. **Sales** — Failure of Consideration. — Unsoundness or imperfection in the subject of a sale does not amount to failure of consideration of the contract of purchase.—Myers v. Cook, W. Va., 104 S. E. 593.

74.——F. O. B.—The initials "f. o. b." in mercantile contracts imply that the seller must bear the expense of conveying the goods to the place of destination and the expense of inspection at the terminal point where inspection before delivery is provided for in the sale contract, but where the term "f. o. b." is used in an executory contract for sale, in the absence of express provision for retention of title pending inspection, the term will be construed to require the seller to deliver the goods without expense to the buyer at the place and time mentioned, when title passes.—Ehrenberg v. Guerrero, Tex., 225 S. W. 86.

75.——Rescission.—Generally, in case of sale of goods to be delivered in installments and paid for in corresponding installments, default in a payment, not justified by the circumstances nor waived, justifies the seller in rescinding the unexecuted portion of the contract and refusing to make further deliveries.—Auer & Twitchell v. Robertson Paper Co., Vt., 111 Atl. 570.

76. **Specific Performance**—Equity.—The statute of frauds is applied in equity suits as well as in actions at law, subject to the rule that, since the statute was designed to prevent fraud, equity will not permit it to be used as an instrument for the accomplishment of fraudulent purposes.—Zellner v. Wassman, Cal., 193 Pac. 84.

77. **Vendor and Purchaser.** — Agreement to Convey.—The rule that an agreement to convey by quitclaim does not require the vendor to convey a good title, and Civ. Code, § 1113, have no application to a case where from other considerations it is plain that contract is conditioned upon the vendee's being let into actual possession.—National Pacific Oil Co. v. Watson, Cal., 193 Pac. 133.

78.——Possession as Notice.—The possession of land by one other than the person claiming title is a fact sufficient, in many instances, to put the intending purchaser upon inquiry as to the nature and extent of such possession.—Harth v. Pollock, Ore., 193 Pac. 202.

79. **Waters and Water Courses.**—Diversion.—Diversion of drainage from a natural channel into a channel through plaintiff's land was unlawful.—San Gabriel Valley Country Club v. City of Pasadena, Cal., 193 Pac. 97.

80. **Wills**—Mental Impairment.—Where there is ample evidence of permanent mental impairment following an apoplectic stroke, it is not necessary that witnesses should have seen the deceased at the date of the execution of the purported will in order to give testimony to his mental condition, as the range of injury may extend to a reasonable period before and after the execution of the will.—Prescott v. Merrick, N. D., 179 N. W. 693.